IN THE
MICHIGAN SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Judge's: Stephens, P.J.; Hoekstra, J.; Meter, J.J.

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

vs.

LORINDA IRENE SWAIN,

Defendant-Appellant.

MSC: 150994

MCOA: 314564

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AMICUS CURIAE BRIEF ON APPEAL
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JURISDICTIONAL STATEMENT

Michael Ward adopts, restates and incorporates the jurisdictional statement from Appellant Swain's briefs. See also, MCR 7.312(H)(amicus).

STATEMENT OF THE CASE

Michael Ward adopts, restates and incorporates the statement of the case from Appellant Swain's briefs.

STATEMENT OF THE FACTS

Michael Ward adopts, restates and incorporates the statement of facts from Appellant Swain's briefs.

STANDARD OF REVIEW

Michael Ward adopts, restates and incorporates the standard of review from Appellant Swain's briefs.

ARGUMENTS AND AUTHORITIES

I. DEFENDANT SWAIN IS ENTITLED TO A NEW TRIAL PURSUANT TO MCL 770.1

The Michigan Supreme Court's attempt to restrict a defendant's right to seek post judgment relief represents an improper attempt to override the will of the Legislature. This issue, arguments and authorities below will demonstrate that the Michigan Supreme Court's most recent pronouncement regarding the limits of its own rule making authority demonstrates that the "cause and prejudice" standards of MCR 6.508(D)(3) improperly limits the legislatively granted authority to the trial court to grant a new trial when justice was not done.

From the inception of this State up until 1989, a criminal defendant could be granted a new trial at any time if a court believed that the interests of justice were not served by the conviction. MCL 770.1

grants a trial court authority to grant a new trial.

> The judge of a court in which the trial of an offense is held may grant a new trial to the defendant for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs.

The time period for filing such motion is set forth in MCL 770.2. This statute provides:

> In a case appealable as of right to the Court of Appeals, a motion for a new trial shall be made within 60 days after entry of the judgment within any further time allowed by the trial court during the 60-day period.
>
> Subsection (4) provides: If the applicable period of time prescribed in subsection (1) or (2) has expired, a court of record may grant a motion for a new trial for good cause shown. If the applicable time period prescribed in subsection (3) has expired and the defendant has not appealed, a municipal court may grant a motion for new trial for good cause shown.

Case law interpreting this statute indicates that it was passed to give the trial court extremely broad authority to re-open old cases in the interest of justice. 1/ The Michigan Supreme Court has given the circuit court judge's judicial power to grant a motion for a new trial in a case that was heard before the judge under Michigan law.

1/ See, Rogers v Howe, 144 F 3d 990 (CA6 1998)(the court was outlining the history of Michigan rule and concluding that prior statutory scheme conferred broad discretion to the trial court to grant a new trial); People v Reed, 449 Mich 375 (1995)("Before October 1, 1989, the procedure for collateral review of criminal convictions in Michigan did not make any provision for finality of judgments. As a consequence, defendant could, and did, repeatedly seek relief without limitation."); People v Barrows, 358 Mich 267 (1959)("Under Michigan law there is no final time limitation upon the power of the trial court to grant a motion for a new trial."); A.G. v Recorder's Court Judge, 341 Mich 461 (1954)("[A] trial judge has inherent power to grant leave to file a delayed motion for a new trial in a case that was heard before him and accept a subsequent plea and pronounce sentence cannot be disputed. This is an inherent judicial function, the exercise of which rests within the sound judicial discretion of a trial judge to so grant when justice requires."); People v Burnstein, 261 Mich 534 (1933)("The circuit judge had the power to order a new trial without limitation of time."); and see generally, James Strazella, Review of Criminal Convictions: Michigan and the ABA Standards Relating to Criminal Appeals and Post-Conviction Remedies, 50 Mich. St. B.J. 748, 751 (1971). This right was created through a legislative statute reflecting a substantive policy decision of the Michigan Legislature that the greater interest of justice outweighed any so-called interest in finality. See, People v Tubbs, 64 Mich 341 (1975)(granting leaeve to appeal, rejecting prosecutor's invitation to adopt a limitation on second appeal, and reversing the defendant's conviction five years after the defendant's original appeal was affirmed).

However, the Michigan Supreme Court promulgated a conflicting court rule which purported to limit a criminal defendant's right to seek post judgment relief to cases which the defendant could demonstrate good cause for not raising an issue in his/her prior appeals (or actual innocence), and actual prejudice. See generally, S.G. Friedman, 14 T.M. Cooley L. Rev. 65 (1997). This rule was based on a substantive (albeit erroneous) policy interest in finality.

In July of 1999, the Michigan Supreme Court allowed the traditional demarcation point between legislative/court rule supremacy. Before that date, rules whose primary area of control was "procedural" pre-empted conflicting statutes. 2/ Now, the Michigan Supreme Court has ruled that in areas where the Legislature is acting to cure perceived social evils through the passage of laws, these statutory provisions are substantive and control. McDougall v Schanz, 461 Mich 15 (1999)(Overruling Perin v Peuler (On Rehearing), 373 Mich 531 (1964); People v Mitchell, 402 Mich 506 (1978); and Buscaino v Rhodes, 385 Mich 474 (1971)). As this is the area that the trial court, Court of Appeals, and now this Court is facing, the statute controls.

The broad reflection of the finality of judgment doctrine is based on the substantive realization that virtually no criminal defendant will hold back winning issues and intentionally remain in prison knowing that such issues exist. An old case elegantly rejects the commonly cited legal fiction that the criminal defendant intentionally withholds issues and chooses to do years of unnecessary time simply to damage the prosecutor's chances of retrials. As recognized by a Federal Court:

2/ See, e.g., Perin, 373 Mich 531, 541; Mitchell, 403 Mich 506; Buscaino, 385 Mich 474.

> There is no indication that a monstrous cost of long years in prison the petitioner has abused the writ by postponing his issues now posed.

U.S. ex rel Coffey v Follette, 310 F Supp 946, 947 (E.D.N.Y. 1949). Further, the American Bar Association has also rejected the "finality doctrine." ABA Standards for Criminal Justice, Std. 22-2.4 and 22-6.1 (suggesting that review should ordinarily be granted, except where the defendant deliberately or inexcusably withholds issues. The burden of showing this rests on the prosecution).

Plainly, when the Legislature rejected the doctrine of finality, they were operating with substantive concerns that preserving the integrity of the criminal justice system outweighed the interest in finality and/or protecting against delayed appeals.

Conversely, MCR 6.508(D)(3)'s cause and prejudice test was adopted with the intent of affecting substantive policy considerations, not simply creating a clear rule for the orderly processing of these motions. In People v Reed, 449 Mich 375 (1995), the Michigan Supreme Court stated the purpose behind the rule was:

> to insure that the finality of criminal judgments was not diminished. Mandating that all appellate attorney's must raise all claims of arguable legal merit will tax judicial resources on direct and post-conviction attack, and reintroduce a multiplicity of post-conviction proceedings. Neither the guarantee of a fair nor direct appeal entitles a defendant to as many attacks on a final conviction as ingenuity may devise.

Plainly, this statement is not referring to a method of court management; MCR 6.508(D)(3) was adopted as a method of affecting substantive policy. As there was a substantive purpose behind both the statute and the court rule, the statute controls over the 6.500 rule; and MCR 2.610, 2.611, 2.612.

II. THE STANDARD WHICH MICHIGAN COURTS SHOULD CONSIDER A DEFENDANTS ASSERTION THAT THE EVIDENCE DEMONSTRATES A SIGNIFICANT POSSIBILITY OF ACTUAL INNOCENCE IN THE CONTEXT OF A MOTION BROUGHT PURSUANT TO MCR 6.502(G), SHOULD INCLUDE "ACTUAL INNOCENCE" ... AND FURTHER, THE MICHIGAN COURT RULES, MCR 6.500 et. seq., AND OTHER PROVISIONS, SHOULD PROVIDE A BASIS FOR RELIEF WHERE A DEFENDANT DEMONSTRATES A SIGNIFICANT POSSIBILITY OF ACTUAL INNOCENCE.

To begin, as argued in Issue I above, the statute governing a new trial should control over a court rule; and a trial court should be given extremely broad discretion in granting a new trial, without limitation to time, after conviction and appeal, where the trial court could find that justice has not been done; and even more-so, in a case where a defendant shows the possibility of his/her actual innocence of the offense as charged.

The "miscarriage of justice" exception applies to cases in which new evidence shows that it is more likely than not that no reasonable juror would have convicted the defendant. McQuiggin v Perkins, ___ U.S. ___; 133 S.Ct. 1924, 1934-35 (2013). 3/ However, the U.S. Supreme Court has held that a credible showing of actual innocence may allow a prisoner to pursue his/her constitutional claims on the merits notwithstanding the existence of a procedural bar to relief. Id., S.Ct. at 1929, 1931-33. See also, Schlup v Delo, 513 U.S. 298, 316, 321-32 (1995); Murray v Carrier, 477 U.S. 478 (1986); Smith v Murray, 477 U.S. 527, 542 (1986); Kuhlmann v Wilson, 477 U.S. 436 (1986); Dugger v Adams, 489 U.S. 401 (1989); and see, 23 A.L.R. Fed 2d 93 (actual innocence excpetion to procedural bars in federal habeas cases - - - Supreme Court cases).

3/ The Sixth Circuit does not distinguish between newly discovered and newly presented evidence. Cleveland v Bradshaw, 693 F 3d 626, 633-34 (CA6 2012), citing Souter v Jones, 395 F 3d 577, 584 (CA6 2005).

A court may consider a procedurally defaulted claim "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Ross v Berghuis, 417 F 3d 552, 556 (CA6 2005), quoting Murray v Carrier, 477 U.S. 478, 496 (1986)(dictum).

Where there is a significant possibility that a defendant is innocent of the offense of which he/she has been convicted, the "good cause" requirement of MCR 6.508(D)(3)(a) is **waived**. People v Reed, 449 Mich 375, 378 ftn.1 (1995); People v Watroba, 193 Mich App 124, 127 (1992). In such cases, prejudice is **presumed**. Sawyer v Whitley, 505 U.S. 333, 339 (1992); Murray v Carrier, 477 U.S. 478, 496 (1986).

Notwithstanding MCR 6.500 et seq., the trial court has the inherent power to grant a new trial, at any time, where "justice has not been done." MCL 770.1; and see, Christianson v Colt Indus. Op. Corp., 486 U.S. 800, 817 (1988); People v Herrera, 204 Mich App 333, 340-41 (1994)(citing MCL 770.1); see also, People v Johnson, 52 Mich App 385 (1974), rev'd., People v Johnson, 391 Mich 834 (1974).

The court in Henderson v Sargent, 926 F 2d 706, 713 (CA8 1991) said: "In our system of justice, a fundamental miscarriage of justice occurs when a person is found guilty of a crime even though the jury had a reasonable doubt about his guilt." "The actual innocence exception applies if the defendant on retrial probably would be acquitted." (citation omitted). Id., at 713. "The actual innocence exception applies in a case if a jury considering the evidence presented to the court probably would not convict ..." Id., at 713.

In Henderson it was held that the actual innocence exception

permitted habeas corpus review of petitioner's claim that he received ineffective assistance of counsel. Id., at 713-14.

See also, actual innocence exception to procedural bar/default: MCR 6.508 (staff comment - case notes); and see, Notes: Staff Comment - - MCR 6.503, 6.506, 6.509.

III. IF MCR 6.502(G) DOES BAR RELIEF, THERE IS AN INDEPENDENT BASIS ON WHICH A DEFENDANT WHO DEMONSTRATES A SIGNIFICANT POSSIBILITY OF ACTUAL INNOCENCE MAY NONETHELESS SEEK RELIEF UNDER THE CONSTITUTIONS OF MICHIGAN AND/OR UNITED STTES.

There is a constitutionally recognized "presumption of innocence," and benefit of guilt "beyond a reasonable doubt."

See and apply the Due Process Clause of Michigan and United States Constitution: U.S. Const, Ams 5, 14; Mich Const, art 1, section 17.

See, Mich Const., art 1, section 12 and U.S. Const., art 1, section 9, clause 2 (the writ of habeas corpus shall not be suspended ...). This Michigan Supreme Court need expand the decision/opinion in Kenney v Booker, 494 Mich 852 (2013).

And see: Notes - Convention Comment - - - Mich Const., art 1, section 15 (#'s 12, 14, 16, 17, 21, 22, 26); Mich Const., art 1, section 20 (#'s 29, 30, 39, 47, 50, 51, 68, 71, 92).

See also, Mich Const., art 6, sections 1 and 4.

CONCLUSION

This Court should determine that a new trial may be sought "at any time," without limitation to a time element, especially in the case of a showing of actual innocence of the crime as charged.

The statute, MCL 770.1, 770.2 controls over the Court Rule, MCR 6.500 et seq.; and MCR 2.610, 2.611, 2.612.

In all other respects both the United States and Michigan Constitutions provide an independent basis on which a defendant who demonstrates a significant possibility of actual innocence may nonetheless seek relief after conviction and appeal of right, without limitation in time.

Date: 11/18/15

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